IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
PART I

SENTINEL TRUST COMPANY, and its Directors, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Bradley S. Lancaster, and Gary L. O'Brien,	)	
Petitioners,	)	
VS.	)	NO. 04-1934-I
KEVIN P. LAVENDER, Commissioner Tennessee Department of Financial Institutions,	)	
Respondent.	)	

MEMORANDUM and ORDER

This case is before the Court on motion requesting the Court issue a writ of supersedeas.

This case involves a challenge to the seizure of a financial institution by the Commissioner of the Tennessee Department of Financial Institutions. The petitioner is a state- chartered trust company. The Commissioner, having already seized the company and placed the business into receivership, is now moving to liquidate the business. The Commissioner filed his notice of liquidation on June 18, 2004. The receivership is pending in the Lewis County Chancery Court, and the notice of liquidation was filed in that court. The petitioner filed a petition for writ of certiorari in

this Court pursuant to T.C.A. § 45-2-1502(c)(1). That statute states:

> (c)(1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.[1]

In turn, the appropriate provision of title 27, chapter 9 states:

> § 27-9-106. Supersedeas - (a) If the order or judgment rendered by such board or commission made the basis of the petition for certiorari shall make any material change in the status of any matter determined therein, the petitioner may, upon reasonable notice to the board or commission and other material defendants, apply to the chancellor, at the time of filing such petition, for a supersedeas, and the chancellor, in the chancellor's discretion, may grant a writ of supersedeas to stay the putting into effect of such order or judgment or any part thereof.
> (b) No such supersedeas shall be granted until a good and sufficient bond, in an amount to be fixed and approved by the chancellor, shall have been given by the petitioner, conditioned to indemnify the defendants named in the petition from any injury that may result by reason of the granting of such supersedeas.

The petition was filed on June 29, 2004. On July 16, 2004, the petitioner filed a motion for expedited hearing on the petition for supersedeas. Because of a scheduling problem, the Chancellor of Part I referred this motion to the undersigned to sit by interchange, and by Order entered August 2, 2004, the

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[1] These statutes (T.C.A. § 27-9-101 et seq.) are titled "Review of Boards and Commissions." See also T.C.A. § 45-1-108(a).

Court set the motion for writ of supersedeas for a hearing on August 5, 2004. The hearing was held as scheduled.

The petitioners explained at the hearing that the Commissioner has no authority under the banking laws to seize a trust company and that this Court should therefore issue the writ of supersedeas and return control of the company to its Board of Directors. The request for supersedeas was made solely based on a statutory and constitutional argument that the seizure and liquidation was beyond the legal power of the Commissioner.[1]

The record in this case indicates that since 2000 the Commissioner has been concerned about the financial well being of Sentinel Trust Company, and in April 2004, the Department was of the opinion that the company had a net cash shortage in excess of $5,000,000.00. This concern led to several meetings between the Commissioner and executives and lawyers from Sentinel. On May 3, 2004, the Commissioner issued an order requiring Sentinel to make a substantial cash infusion by May 17, 2004 to replenish the cash deficiency and to submit to the Commissioner a capital plan.

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[1] Prior to the August 5, 2005 hearing, the Court met with counsel and offered to consolidate the hearings on the request for supersedeas with the review by certiorari and schedule it within 7-10 days so, that all issues before the Court could be resolved. The respondents lawyer indicated that she thought the Commissioner would agree to stop the liquidation until a final hearing, but counsel for petitioners stated that he wished to proceed on his immediate request for writ of supersedeas as he was convinced that the Commissioner was acting beyond his statutory authority.

When the petitioners did not respond to the satisfaction of the Commissioner, events were set in motion as follows:

1. On May 3, 2004, the Commissioner issued a cease and desist order pursuant to T.C.A. § 47-1-107(a)(5), requiring certain financial actions by Sentinel. The petitioners subsequently filed an administrative appeal of the cease and desist order. Events have long since passed that stage, however, and the administrative appeal may now be moot.

2. On May 18, 2004, the Commissioner took emergency possession of Sentinel pursuant to T.C.A. §§ 45-2-1502(b)(1) and (c)(1). The receivership was filed in the Lewis County Chancery Court as case number 4781. The record reflects that the parties believe that only this Court has jurisdiction over this challenge to the liquidation. This Court is not so sure.

It makes little sense for the receivership to be in Lewis County and yet the challenge to the seizure and liquidation go to another. The statutes do not seem to mandate such severance of issues. It appears to this Court that the entire statutory scheme contemplates that issue related to the receivership, seizure, and termination all be in the same court - not two (2) courts. In fact, in order for the liquidation to go forward, it must be approved by the Lewis County Chancery Court. See T.C.A. § 45-2-1502(c)(2). The only mention of Davidson County Chancery Court is the authorization of the Commissioner to seek an

injunction to enforce the law under T.C.A. § 45-1-107(a)(5) only in Davidson County. Review under Title 27, Chapter 9 pursuant to T.C.A. § 45-1-108 is not confined to Davidson County' Chancery but can be filed in any chancery or circuit court. See T.C.A. §§ 27-9-102 and 103.[3]

3. On May 18, 2004, the Commissioner appointed Receivership Management, Inc. to act as receiver. See T.C.A. § 45-2-1502(b)(2).

4. In June 2004, Department personnel issued a report stating that Sentinel had a deficiency in excess of $7,500,000.00 and that Sentinel was operating at a loss and only had corporate assets of around $1,400,000.00. The report concluded that Sentinel was insolvent.

5. On June 18, 2004, in light of the above and pursuant to T.C.A. §§ 45-2-1502(c)(2) and 1504, the Commissioner issued a Notice of Liquidation of Sentinel Trust Company. As already noted, the notice was filed in the Chancery Court for Lewis County. That notice recites the factual contentions of the Commissioner and concludes:

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[3]The Court is aware of the holding in Tennessee Real Estate Commission v. Potts, 428 S.W.2d 794 (Tenn. 1968) that normally the review of an administrative decision of a Board or Commissioner should be filed in Davidson County. The Court doubts the efficacy of that decision when the Commissioner has already invoked the jurisdiction of the local Chancery Court on the same subject matter as the certiorari proceeding.

> Accordingly, the Commissioner has determined that liquidation of Sentinel Trust Company in accordance with the provisions of Tenn. Code. Ann. §§ 45-2-1502(c)(2) and 1504 is necessary and appropriate.
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> Any person aggrieved or directly affected by the Commissioner's determination to liquidate Sentinel Trust Company may have judicial review in Davidson County Chancery Court by common-law writ of certiorari, as provided in Title 27, Chapter 9 of Tennessee Code Annotated, pursuant to Tenn. Code Ann. § 45-1-108(a).

6. The petitioners on June 29, 2004 filed a complaint titled "Petition for Writ of Certiorari and for subsequent Writ of Supersedeas."

7. On July 16, 2004, the petitioners filed a "Motion For Expedited Hearing on Petition For Supersedeas" requesting a hearing be set and that a writ of supersedeas be issued after the hearing.

The motion by petitioners seeks the writ of supersedeas because "Sentinel Trust Company is not a bank, and has none of the characteristic attributes of a bank" and that the statutory powers the Commissioner exercised only apply to a bank and therefore the Commissioner has acted "illegally" and "wholly outside his administrative and policing authority." The motion further states that "unless the writ of supersedeas shall be issued promptly to nullify the respondent Commissioner's past illegal acts, he soon will have succeeded in destroying Sentinel Trust Company." The petitioner recites "the urgency of need for nullification of the Commissioner's arbitrary and illegal orders

by supersedeas, so that its business may again be operated by its knowledgeable staff pending final determination."

The lawyer for the petitioners has chosen the battleground. He has chosen to not yet enter the factual fray but has chosen the law as his weapon. He insists that the Commissioner has exceeded his statutory authority. He states emphatically that the statutes used by the Commissioner do not apply to trust companies but only apply to banks. The petitioners are wrong.

Whatever ambiguity there might have been prior to 1999 in the application of the banking laws to trust companies, it was eliminated in 1999. In 1999, the General Assembly amended the Act to specifically make trust companies subject to all of its provisions, not just those pertaining to fiduciaries. Section 3 of Chapter 112 of the Public Acts of 1999 amended T.C.A. § 45-1-124(b) by deleting that subsection and substituting the following:

> (b) To the full extent consistent with such rights, liabilities and penalties, all state banks and, to the extent applicable, all banks, shall hereafter be operated in accordance with the provisions of this chapter and Chapter 2 of this title. Unless the Commissioner determines otherwise, the provisions of Title 45, Chapters 1 and 2 and the rules thereof shall apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers.

Section 4 of Chapter 112 further amended Tenn. Code. Ann. § 45-1-124 to add the following new subsection:

() The charter of a trust company granted by the commissioner shall not be void due to enactment of any amendment or repeal of the laws under which it was formed if such trust company is in operation, as determined by the commissioner, on July 1, 1999.

() Companies engaged in activities subject to Title 45, Chapters 1 and 2, on July 1, 1999, but formed, as determined by the commissioner, prior to the enactment of Chapter 620 of the Public Acts of 1980 and not previously subject to regulation by the commissioner may continue to act as a fiduciary without submitting an application. However, such entities shall otherwise be fully subject to Chapters 1 and 2.

() Companies authorized by their charter, prior to the enactment of Chapter 620, to engage in fiduciary activities, but not engaging in fiduciary activities on July 1, 1999, then must file the appropriate application to establish a trust company and then fully comply with Chapter 1 and 2.

() All state trust companies operating on July 1, 1999, shall have such period of time as the commissioner determines to be reasonable and prudent to conform to the requirements of Chapter 1 and 2 and the regulations thereunder, but such period shall not exceed three (3) years from July 1, 1999. During this period of time, to conform to the requirements of Chapter 1 and 2, the commissioner may conduct examinations at such company's expenses, and apply the requirements of Chapters 1 and 2 as deemed appropriate.

These provisions of Chapter 112 make it clear the General Assembly's intent that all of Chapters 1 and 2 of Title 45 shall apply to the operation and regulation of state trust companies and that such companies shall fully comply and conform with all

the provisions of these chapters, not just the provisions pertaining to fiduciary activities.[4]

The Commissioner took possession of Sentinel pursuant to the provisions of Tenn. Code Ann. § 45-2-1502, which provides in part as follows:

> (a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:
> (1) Its capital is impaired or it is otherwise in an unsound condition;
> (2) Its business is being conducted in an unlawful or unsound manner;
> (3) It is unable to continue normal operations; or
> (4) Its examination has been obstructed or impeded.
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> * * *
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> (c)(1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.

Petitioners make the novel argument that because this statute speaks only in terms of a state bank and its depositors and because Sentinel is neither a state bank nor has any deposits/depositors, this statute does not apply to Sentinel and, therefore, the Commissioner acted illegally or exceeded his authority when he took possession of Sentinel pursuant to this statute. This argument is directly contrary, however, to the

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[4]The definition section of the Tennessee Banking Act contains the definitions of "state trust company" and "trust company" at T.C.A. § 45-1-103(27) and (31).

clearly expressed intent of the General Assembly as set forth in Chapter 112. As discussed, supra, that act specifically states that "the provisions of Title 45, Chapters 1 and 2 and the rules thereof shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers." Tenn. Code Ann. § 45-2-1502 clearly is a provision contained within Chapter 2 of Title 45 and, therefore, applies to the operation and regulation of Sentinel Trust Company. As such, the Commissioner acted with express statutory authority in taking possession of Sentinel pursuant to Tenn. Code Ann. § 45-2-1502.

The petitioners also make a secondary argument: that the acts of the Commissioner are unconstitutional. The Court disagrees. Intrusive statutory schemes governing financial institutions have been upheld against constitutional attack. Financial institutions traditionally have been very highly regulated by the government for obvious reasons. If the statutory scheme provides for emergency seizure and/or liquidation, the statute must provide for an immediate post-seizure hearing. The availability of such a hearing is set forth at Tenn. Code Ann. § 45-2-1502(c)(1). There is nothing in this record to indicate that the Chancery Court of Lewis County in the receivership action is not prepared to review all of the Commissioner's actions from the receivership to the seizure to the liquidation. These statutes

granting the Commissioner the powers set forth are constitutional. See, e.g., Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552 (1947); Anonymous Bank v. Florida Dept. of Banking, 512 So. 2d 1112 (Fla. Dist. Ct. App. 1987). There is nothing contained in the Constitution of Tennessee or Tennessee case law inconsistant with the above conclusion.

In Fahey the court reversed a federal district court that had declared unconstitutional the seizure of a federal savings and loan association. The court emphasized that the statutes were not "penal" but "regulatory".

> They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards.

Fahey, 332 U.S. at 252.

> It is complained that these regulations provide for hearing after the conservator takes possession instead of before. This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say it is unconstitutional.

Fahey, 332 U.S. at 253-54.

For the reasons expressed, the Court concludes that the Tennessee banking laws contained in Chapters 1 and 2 of Title 45 fully apply to trust companies and that these statutes are constitutional. The factual foundation supporting the emergency seizure and subsequent decision to liquidate was not presented to the Court, and the Court expresses no opinion on that issue.

The Court is not convinced that it is the appropriate court to resolve this dispute. The receivership was filed in the Lewis County Chancery Court (and that court is proceeding with the receivership), and the notice of liquidation was filed in that court. Before any further proceeding are held in this Court, the parties shall need to address whether this Court has jurisdiction and/or is otherwise the appropriate court to continue this action.

The motion for writ of supersedeas is denied.

This the 9 day of Aug, 2004.

WALTER C. KURTZ, JUDGE
BY INTERCHANGE

cc via fax and mail:
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